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No. 91-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CELESTINE PIERRE,

Petitioner,

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY AND LIFE INSURANCE COMPANY OF NORTH AMERICA,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether factual determinations made by claim administrators under an Employee Retirement Income Security Act ("ERISA") plan, are properly reviewed under the abuse of discretion standard or must be reviewed *de novo* by the courts.

2. Whether claim administrators under ERISA are limited by the Federal Rules of Evidence in their investigation and determination of claims made under an ERISA plan.

STATEMENT OF INTERESTED PARTIES

All parties to the proceedings below are named in the caption, with the exception of the Estate of James Nolan Pierre, Jr. Pursuant to Rule 29.1 of the Rules of this Court, the following is a statement of all parent companies and non-wholly owned subsidiaries of respondents: The parent of both Connecticut General Life Insurance Company ("CGLIC") and Life Insurance Company of North America ("LINA") is Connecticut General Corporation. The parent of Connecticut General Corporation is CIGNA Holdings, Inc. The parent of CIGNA Holdings, Inc. is CIGNA Corporation. CGLIC's subsidiaries, other than wholly owned subsidiaries, are Greenspoint Marriott Restaurant Corporation, North Coast Investment Corporation, PCGP, Inc., and CIGNA Private Equities, Inc. LINA's only subsidiary that is not wholly-owned is CIGNA Private Equities, Inc.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Connecticut General Life Insurance Company and Life Insurance Company of North America, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's decision in this case.

OPINIONS AND ORDERS BELOW

The February 23, 1989 opinion of the United States Court of Appeals for the Fifth Circuit is reported at 866 F.2d 141 and reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 136-

149. The June 30, 1989 order of the Court of Appeals remanding the case to the United States District Court for the Eastern District of Louisiana for reconsideration in light of *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), is reported at 877 F.2d 345. The Court of Appeals decision directly below is reported at 932 F.2d 1552 and reproduced in Pet. App. at 57-116. The June 22, 1989 ruling of the District Court is unreported and reproduced in Pet. App. at 117-135. The October 31, 1989 opinion and order of the District Court on remand from the Fifth Circuit is unreported and reproduced in Pet. App. at 150-159.

JURISDICTION

The Court of Appeals entered judgment on June 18, 1991. On September 16, 1991, the petitioner filed a Petition for Writ of Certiorari, invoking the jurisdiction of this Court under 28 U.S.C. § 1254(l). On October 10, 1991, respondents were granted an extension of time within which to file a response to the petition to and including October 31, 1991.

STATUTES AND RULES INVOLVED

Sections 502(a)(1) and 503 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(1), 1133, are reproduced in respondents' Appendix, at 1a, *infra*. Federal Rules of Evidence 803(24) and 804(b)(5) are reproduced in respondents' Appendix, at 1a-2a, *infra*.

STATEMENT OF THE CASE

Insurance policies were issued by respondents, Connecticut General Life Insurance Company ("CGLIC") and Life Insurance Company of North America

("LINA") (collectively, "CG/LINA"), to Martin Marietta Corporation, employer of petitioner's husband, to fund an employee welfare benefit plan governed by ERISA (the "Plan"). Martin Marietta, the Plan Administrator, authorized CG/LINA to administer claims under the Plan pursuant to its terms. Pet. App. at 61, 932 F.2d at 1553.

In November of 1986, petitioner filed claims asserting that she was entitled to death benefits under the "accidental death" provisions of the Plan because of the death of her husband. After an investigation, the CG/LINA claim administrator concluded that, under the terms of the policies, claimant was not entitled to death benefits because her husband had been the aggressor and by his own acts precipitated his death by foreseeable means. Pet. App. at 65, 932 F.2d at 1554. Her claim was accordingly denied.

Respondents' investigation included consideration of information supplied by investigators with the New Orleans Police Department, examination of the autopsy report, and a separate private investigation. The conclusion that decedent had been shot by his mistress during his physical assault on her was supported by the police department's decision not to prosecute the assailant, the police reports, police photographs of the bruises and lacerations sustained by the assailant, and interviews with her. Pet. App. at 62-64, 932 F.2d at 1554.

The CG/LINA claim administrator informed the petitioner of his decision to deny her claims for benefits and the basis for his denial. He provided petitioner with the opportunity to submit any additional or contrary information to support her claim.

She failed to do so. Pet. App. at 64-65, 932 F.2d at 1554.

Petitioner brought this action in the Civil District Court for the Parish of Orleans, State of Louisiana, alleging that respondents wrongfully denied her benefits under the Plan. Respondents removed the action to the United States District Court for the Eastern District of Louisiana on the ground that the District Court had jurisdiction under 29 U.S.C. § 1132(e)(1). At the initial hearing, the matter was submitted to the court on stipulated facts. The District Court sustained the denial of benefits as a matter of law because respondents' determination that Pierre's death was not accidental under the terms of the Plan was not arbitrary and capricious. Pet. App. at 135.

Petitioner appealed the District Court's decision, and the Fifth Circuit affirmed. Pet. App. at 149, 866 F.2d at 144. On petition for rehearing, the Fifth Circuit vacated its opinion and remanded the matter to the District Court for reconsideration in light of *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989). *See Pierre* v. *Connecticut Gen. Life Ins. Co.*, 877 F.2d 345, 346 (5th Cir. 1989).

On remand, the District Court determined that *Bruch* required a *de novo* review of the factual findings that led to the decision to deny benefits because the Plan did not contain specific language granting discretionary authority with respect to the claim administrator's conclusions. Pet. App. at 156. The District Court ruled that the assailant's statements corroborating the police conclusion of self-defense were inadmissible as "hearsay," and that the remaining non-hearsay evidence was insufficient, standing alone, to support the finding that the death was

not accidental. The District Court, therefore, reversed its earlier order and entered judgment for the petitioner. Pet. App. at 157-158.

On appeal, the Fifth Circuit reversed, concluding that *Bruch* did not require a *de novo* review of factual determinations; rather, it held that the appropriate standard for review of determinations of fact is abuse of discretion. Based on that standard, the court below reviewed the evidence before the claim administrator and upheld the denial of benefits. Pet. App. at 60, 932 F.2d at 1553.

SUMMARY OF ARGUMENT

In *Bruch*, this Court held that ERISA "actions challenging denials of benefits based on plan interpretations," 489 U.S. at 108, are "to be reviewed under a *de novo* standard." *Id.* at 115. The court below correctly read *Bruch* as requiring such an exacting standard of review only with respect to "plan term interpretations," Pet. App. at 83-84, 932 F.2d at 1557, and not with respect to determinations of "facts underlying the claim for benefits." Pet. App. at 83, 932 F.2d at 1557. In so holding, the court below rejected the contention that the cases relied upon by petitioner required a contrary result, reasoning that the language from those cases was not on point, was *dicta*, or represented a "reflexive" application of *Bruch* without a considered analysis of the distinction between issues of fact and interpretations of the terms of an ERISA plan. Pet. App. at 94-108, 932 F.2d at 1559-1562.

Subsequent to the filing of the certiorari petition in this case, the United States Court of Appeals for the Third Circuit issued its decision in *Luby* v. *Teams-*

ters Health, Welfare & Pension Trust Fund, Nos. 90-1900 & 90-1912 (3d Cir. Sept. 20, 1991). That decision held, contrary to the decision of the court below in *Pierre*, that the Court in *Bruch* intended the *de novo* standard to apply to factual determinations. However, although a conflict in the circuits does now exist, principally between *Pierre* and *Luby*, that conflict is limited to benefit determinations made under plans which do not give claim administrators discretionary authority to determine eligibility or construe terms of the plans. Once plans have responded to this Court's holding in *Bruch*, the distinction between interpretations of plan terms and factual determinations will have little significance. In the words of this Court, "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard *unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.*" 489 U.S. at 115 (emphasis added). Thus, *Bruch* provides a roadmap for resolving the issue of the standard of review: where the plan expressly grants discretion to determine eligibility for benefits or to construe the terms of the plan, the *de novo* standard of review will not apply. Concern over the ambit of *de novo* review, therefore, will be confined to that relatively small and diminishing category of cases consisting of claims that arise pursuant to plans that did not contain discretionary language prior to *Bruch*, and have not been amended pursuant to the guidance provided by this Court in *Bruch*.

Moreover, even if the conflict urged by petitioner were of sufficient importance to merit this Court's review, the issue involved has been squarely and thoroughly addressed by only two courts of appeal. *See infra* notes 2-3 and accompanying text. Under these circumstances, a grant of certiorari now would be premature. The lower courts should have a greater opportunity to resolve this issue of receding importance, before this Court need find it necessary to exercise its discretion and expend its resources on such a narrow question. Accordingly, the Court should deny certiorari as it did at the outset of this Term in a similar case. *Siska* v. *The Travelers*, 60 U.S.L.W. 3262 (Oct. 7, 1991), *denying cert. to* 467 N.W.2d 174 (Wis. App. 1991).

The second issue presented for review, whether the Federal Rules of Evidence apply to a claim administrator's benefit determinations, is not worthy of certiorari under any standard, and the circuits are not in conflict. The relevant cases are clear and uniform in rejecting the applicability of formal rules of evidence to a claim administrator's disposition of benefit claims. *Daniel* v. *Eaton Corp.*, 839 F.2d 263 (6th Cir.), *cert. denied*, 488 U.S. 826 (1988), cited by the petitioner as reflecting a conflict with the decision below, stands only for the proposition that the Federal Rules of Evidence apply *at trial* to govern the admissibility of documents considered by a claim administrator. Thus, *Daniel* does not address the substantive content of what a claim administrator may consider in making benefit determinations.

The cases cited by petitioner as requiring a substantial guarantee of trustworthiness for consideration by a claim administrator of hearsay evidence are not inconsistent with the decision below. The Fifth Circuit considered the existence of corroborating evidence and other indicia of reliability in affirming the

claim administrator's consideration of the hearsay evidence in this case. Accordingly, the second issue presented by the petitioner, like the first, does not provide a basis for a grant of certiorari in this case.

REASONS FOR DENYING THE PETITION

I

IT IS NEITHER NECESSARY NOR APPROPRIATE FOR THE COURT TO DETERMINE WHETHER THE *DE NOVO* OR THE ABUSE OF DISCRETION STANDARD OF REVIEW APPLIES TO FACTUAL DETERMINATIONS UNDERLYING ERISA BENEFIT CLAIMS

A. The Issue that Divides *Pierre* and *Luby*—Whether the *De Novo* Standard Applies to the Review of Factual Determinations Underlying ERISA Benefit Claims—Will Have No Bearing on the Review of Claims Made Under Plans That Grant Discretionary Authority to Claim Administrators.

As a result of *Luby* v. *Teamsters Health, Welfare & Pension Trust Funds*, Nos. 90-1900 & 90-1912 (3d Cir. Sept. 20, 1991), there is a division between the Third Circuit, which holds that the *de novo* review requirement of *Bruch* extends to factual determinations, and the Fifth Circuit, which holds that it does not. Pet. App. at 60, 932 F.2d at 1553. However, the significance of this conflict is confined to benefit determinations made under plans that did not contain discretionary language before *Bruch*, or made thereafter under plan language that has not been amended in reponse to *Bruch*. Regardless of how far the *Bruch* standard of review was meant to extend, it is only applicable if the benefit plan fails to give the "administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Bruch*, 489 U.S. at 115. *Bruch* makes

it clear that the standard for review of all benefit determinations, whether factual, legal, or a combination of the two, may be controlled by amendment of the plan language granting the claim administrator discretionary authority over benefit claim determinations. If such discretion is granted, courts must apply a deferential, rather than a *de novo*, standard in reviewing all factual and plan term interpretations underlying claim determinations. Thus, the issue that divides the court below from the Third Circuit in *Luby* applies only to a decreasing body of benefit claims governed by plans that antedate or that have not been amended in response to *Bruch*.

As this Court has observed, it must limit its discretionary review to those important legal issues that are "beyond the academic or the episodic." *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). This admonition applies with special force here. The primary issue in this case is both episodic—essentially limited in time to those cases arising from determinations made in the absence of plan provisions granting discretionary authority—and academic—having no impact on the current ability of plan administrators and fiduciaries to ensure the application of discretionary review through simple plan amendment.

In sum, the Court in *Bruch* has made it clear how ERISA plans may be structured to avoid *de novo* review. Once such amendments are implemented, the distinction between *Luby* and *Pierre* will become increasingly irrelevant. This is not a situation that warrants the intervention of this Court.[1]

---

[1] Of course, if a plan neglects to add the discretionary language suggested by *Bruch*, or chooses not to do so, then benefit

B. The Lower Courts Have Not Had Sufficient Time To Resolve This Issue.

As stated by former Justice Harlan, "even where a 'true' conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals . . . . " Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108 (1959). Justice Harlan's cautionary observation is especially pertinent to this Petition.

In *Pierre*, the Fifth Circuit reviewed the decisions from other circuits that, in the absence of plan language granting discretion to claim administrators, extended *de novo* review to factual determinations.[2] The

determinations made under that plan may be subject to more rigorous judicial review. However, to the extent this situation arises, it is a problem of the plan's own making, and does not raise an issue of sufficient importance to merit plenary consideration by this Court.

[2] The Fifth Circuit correctly observed that the applicability of *de novo* review to factual determinations was not an issue in *McMahon* v. *New England Mut. Life Ins. Co.*, 888 F.2d 426 (6th Cir. 1989), because the parties had agreed that *de novo* review was appropriate. Furthermore, the question presented to that court was, at least arguably, a plan term interpretation rather than a factual determination. With respect to *Brown* v. *Ampco-Pittsburgh Corp.*, 876 F.2d 546 (6th Cir. 1989), the Fifth Circuit acknowledged that the *Brown* court had applied a *de novo* standard of review to an apparent factual issue, but pointed out that the *Brown* court had "failed to address the distinction between factual determinations and plan interpretations." Pet. App. at 96, 932 F.2d at 1560.

The issue was addressed, but only in *dicta*, in the Seventh Circuit's opinion in *Petrilli* v. *Drechsel*, 910 F.2d 1441 (7th Cir.

Fifth Circuit concluded that these courts had "reflexively applied *Bruch* to all § 1132(a)(1)(B) claims without addressing the distinction between term and fact issues." Pet. App. at 96, 932 F.2d at 1560. Only in *Pierre* and *Luby*, decided less than six weeks ago, have the courts of appeals directly and clearly addressed the applicability of *Bruch* to factual determinations.[3] Thus, the courts of appeals have not had

1990). That court, while declining to resolve the issue, would have read *Bruch* as extending the *de novo* standard of review to factual determinations. The *Pierre* court analyzed and rejected the reasoning of the *Petrilli* court. *Pierre* also rejected, for similiar reasons, the Fourth Circuit's unexplained *ipse dixit* holding in *Reinking* v. *Philadelphia American Life Ins. Co.*, 910 F.2d 1210 (4th Cir. 1990).

[3] While petitioner contends that "[a]t least the Fourth, Sixth, Seventh, and Eighth Circuits have held that a *de novo* review is appropriate when considering determinations of fact," Pet. at 17-18, the cases to which the petitioner alludes do not support that assertion. In *Boyd* v. *Trustees of United Mine Workers Health & Retirement Fund*, 873 F.2d 57 (4th Cir. 1989), the applicability of *de novo* review to factual determinations was not at issue. The court applied an abuse of discretion standard because the plan gave the administrator sufficient discretion to avoid *de novo* review. In *Wallace* v. *Firestone Tire & Rubber Co.*, 882 F.2d 1327 (8th Cir. 1989), the court did apply a *de novo* standard of review but did not address the distinction between factual determinations and plan term interpretations. In *Burnham* v. *Guardian Life Ins. Co. of America*, 873 F.2d 486 (1st Cir. 1989), the court applied a *de novo* standard of review, but the controlling facts were undisputed. Despite her assertion that the Sixth and Seventh Circuits applied a *de novo* standard of review to factual determinations, the petitioner did not cite to any cases in either of those circuits to support that contention. Respondents are aware of no decisions from either of those courts of appeals that present a square and clear conflict with the court below.

sufficient opportunity squarely to address and resolve the primary issue presented by this petition.

As Justice Harlan recognized, a petition for certiorari should be granted, based solely on a conflict among the circuits, "in instances where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court alone." Harlan, *supra*, at 108. Until the courts of appeals have had time to resolve the narrow and evanescent conflict presented by the petition in this case, it cannot be said that the prompt action of this Court is necessary for its resolution.

Perhaps in recognition that review of the issue presented by this petition would be premature, the Court recently denied certiorari in a state case which, like *Pierre*, held that *de novo* review of factual determinations was not required by *Bruch*. *Siska* v. *The Travelers*, 60 U.S.L.W. 3262 (Oct. 7, 1991), *denying cert. to* 467 N.W.2d 174 (Wis. App. 1991). The same considerations that caused this Court to deny certiorari in *Siska* apply with equal force in this case.

II

THE APPLICABILITY OF THE FEDERAL RULES OF EVIDENCE TO BENEFIT CLAIMS DETERMINATIONS IS NOT AN ISSUE THAT DIVIDES THE CIRCUITS, OR THAT OTHERWISE MERITS CERTIORARI

Petitioner's second question presented appears to pose two issues in the alternative: whether the Federal Rules of Evidence should be imposed on the investigative process of claim administrators; and, if not, whether information considered by a claim administrator must be limited to material that is accompanied by "sufficient indicia of trustworthiness."

Daniel v. *Eaton Corp.*, 839 F.2d 263, 268 (6th Cir.), *cert. denied*, 488 U.S. 826 (1988). The petitioner's perception of a division among the circuits on either of these issues is both erroneous and premised on a misreading of the authorities cited.

The petitioner suggests an inconsistency between the ruling of the court below regarding the materials that may be considered by claim administrators making benefit determinations, and the decision in *Daniel*. However, in *Daniel* the issue was not what evidence the claim administrator could consider. Having conceded that the claim administrator had examined the terms of a collective bargaining agreement, the claimant had simply questioned whether the court could admit into evidence an unauthenticated copy of that agreement. It was this trial court *authenticity* issue, not the administrator's claim investigation, to which the *Daniel* court held that the Federal Rules of Evidence applied. If, instead, petitioner's issue is properly understood as the nature of the evidence that may be considered by a claim administrator, the uniform holdings of the federal courts reject the applicability of formal rules of evidence and are fully consistent with the ruling below. *See, e.g.*, *Grossmuller* v. *UAW Local 813*, 715 F.2d 853, 857 (3d Cir. 1983); *Toland* v. *McCarthy*, 499 F. Supp. 1183, 1192-93 (D. Mass. 1980); *Nozar* v. *John Hancock Mut. Life Ins. Co.*, No. 89 C 5496, slip op. at 5 (N.D. Ill. July 19, 1990).

In addition, no conflict exists with respect to the latter portion of petitioner's second question presented—whether hearsay evidence without substantial guarantees of trustworthiness may be considered by claim administrators. Petitioner's suggestion that the

court below failed to gauge the trustworthiness of the evidence, and that this ruling creates an inconsistency between the courts of appeals, is simply incorrect. Petitioner does not cite a single federal appellate court decision that purports to conflict with the ruling below. *See* Pet. at 43-56. Moreover, properly understood, the decision below is fully consistent with the prior Fifth Circuit precedent and other authorities upon which the petitioner does rely. *Compare* Pet. App. at 113, 932 F.2d at 1562 ("The heart of this case is the weight to be given to certain 'hearsay' statements . . . . On review, however, *we can require that the hearsay meet certain indicia of reliability*; if it does not, the abuse of discretion standard permits the court to reject the finding.") (emphasis added) *with School Board of Broward County* v. *Department of Health, Education & Welfare*, 525 F.2d 900, 906 (5th Cir. 1976) ("based on the Supreme Court's approach in [*Richardson* v.] *Perales*, we must reject a *per se* rule that hearsay cannot constitute substantial evidence. Rather, we must look to those factors which 'assure underlying reliability and probative value' to determine whether the hearsay in the present case constitutes substantial evidence."(citations omitted)).

Neither aspect of the petitioner's second issue presents a conflict among the circuits, or a matter worthy of certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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The principal statutory provisions involved in this case are sections 502(a)(1) and 503 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(1), 1133, and Federal Rules of Evidence 803(24) and 804(b)(5). Section 502(a)(1) of ERISA provides, in relevant part:

> A civil action may be brought—
> (1) by a participant or beneficiary—
>
> > (A) for the relief provided for in subsection (c) of this section, or
> >
> > (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

Section 503 of ERISA provides:

> In accordance with regulations of the Secretary, every employee benefit plan shall—
>
> > (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
> >
> > (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

Federal Rules of Evidence 803(24) and 804(b)(5) each provide:

> Other exceptions. A statement not specifically covered by any of the foregoing exceptions but

having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.